IN THE

Supreme Court of the United States

October Term, 1976

No. —— 76-447

WILLIAM G. MILLIKEN, et al.,
Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF DETROIT, et al.,
Respondents,

RONALD BRADLEY, et al.,
Respondents.

BRIEF FOR BRADLEY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ELLIOT S. HALL
2755 Guardian Building
500 Griswold Avenue
Detroit, Michigan 48226

DAVID D. GREGORY
246 Deering Avenue
Portland, Maine 04102

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

LOUIS R. LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

THOMAS I. ATKINS
451 Massachusetts Avenue
Boston, Massachusetts 02118

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Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit remanding the case to the District Court for further proceedings (Pet. App. 151a-190a) is not yet reported. Reported opinions of the District Court on the desegregation order entered below are set forth at 402 F. Supp. 1096 (Pet. App. 71-881) and 411 F. Supp. 943 (Pet. App. 103a-111a). Ancillary orders of the District Court (Pet. App. 1a-2a, 89a-101a, 113a, 115a-144a, and 145a-149a) are not reported. Earlier opinions of the court below pertaining to the finding of acts of *de jure* segrega-

tion by the State petitioners (not reprinted in the Appendix to the Petition) are reported at 433 F.2d 897 and 338 F. Supp. 582, *affirmed,* 484 F.2d 215.

Jurisdiction

The Court of Appeals' judgment remanding the case to the District Court was rendered on August 4, 1976. This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether the courts below erred in directing state defendants, found to have committed acts causally productive of *de jure* segregation in a public schools system, to bear partial costs of implementing educational and administrative components found below to be necessary to the proper effectuation of a desegregation plan.

Statement

This case originated in April 1970 when the Detroit Board of Education adopted a plan to alter senior high school attendance zones over a three-year period in order to promote racial integration in the city schools. Within three months the legislature of the State of Michigan reacted with legislation designed to thwart that local effort; one section of the legislation specifically delayed implementation of the Detroit Board's plan. *See Bradley* v. *Milliken,* 433 F.2d 897 (6th Cir. 1970) (holding that provision to be unconstitutional). Plaintiffs' complaint was filed on August 18, 1970. The District Court found that both the city and state defendants had engaged in acts causally productive of system-wide racial discrimination

and, after reviewing several proposed remedial alternatives, directed preparation of an inter-district school-desegregation remedy. *Id.,* 338 F. Supp. 582 (E.D. Mich. 1971). The Court of Appeals affirmed the District Court's findings on *de jure* segregation and its findings and conclusions respecting Detroit-only desegregation plans. *Id.,* 484 F.2d 215 (6th Cir. 1973).

The present stage of this litigation commenced with this Court's decision in *Milliken* v. *Bradley,* 418 U.S. 717 (1974). This Court reversed the judgment of the Court of Appeals insofar as it had approved a principle of an inter-district school-desegregation remedy upon an erroneous legal standard. The cause was remanded for further proceedings in the courts below directed toward development of a remedy for racial discrimination within the Detroit city school system, a remedy which this Court recognized to have been too long delayed. *Id.* at 753.

On remand the District Court directed the parties to submit proposed desegregation plans and as an interim measure on May 21, 1975, reinstated its July 11, 1972, order directing acquisition of additional school buses to be used in implementing such plan as the Court might later approve. The Court of Appeals modified the order to direct the Detroit school board to acquire the transportation equipment with the state defendants to bear seventy-five per cent of the cost. 519 F.2d 679 (Pet. App. 3a). This Court denied the state defendants' petition for writ of certiorari. 423 U.S. 930 (1975).

On August 15, 1975, the District Court entered a memorandum opinion (Pet. App. 7a) rejecting the proposed desegregation plans as submitted and setting forth remedial guidelines for development of a final plan. That opinion encompassed the Detroit Board's proposal to include administrative and educational adjuncts to pupil

reassignment which are the subject of the present petition here. The plaintiffs immediately appealed. On November 4, 1975, the District Court modified and approved the Detroit Board's final desegregation plan; its judgment was separately entered on November 20, 1975. The plaintiffs appealed from entry of that judgment. The District Court's final judgment, including continuance of the pupil-assignment plan earlier approved, and its modifications and approval of the Detroit Board's development of an in-service teacher-training program and nondiscriminatory programs for reading and communications skills, testing, and counseling and career guidance, was entered on May 11, 1976. (Pet. App. 115a.) Various other District Court opinions and orders on matters ancillary to pupil desegregation were entered between the August 15th and May 11th opinions.

On appeal the Court of Appeals affirmed the pupil-assignment aspects of the court-approved plan but remanded for further consideration of the exclusion from desegregation of three out of eight subdistricts of the Detroit system. Insofar as is pertinent to the present petition, the Court of Appeals affirmed the inclusion of educational components in the implementation of a Detroit-only plan of desegregation. The District Court had found: "the components we order are necessary to repair the effects of past segregation, assure a successful desegregation effort and minimize the possibility of resegregation." 402 F. Supp. at 1118 (Pet. App. 117a). The Court of Appeals held: "This finding is not clearly erroneous, but to the contrary is supported by ample evidence." (Pet. App. 170a.) As to the state defendants' contention, reiterated in its petition in this Court, the Court of Appeals said:

> The decision of the District Court in the present case imposes no money judgment on the State of Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).
>
> The eleventh amendment contention of the State defendants is without merit.
>
> We hold that it is within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which State officials, including the Legislature, have helped to create. We reemphasize that it is the law of this case that the State of Michigan has been guilty of acts which have a causal relation to the de jure segregation that exists in Detroit . . . .
>
> Since Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit, the State has an obligation not only to eliminate the unlawful segregation but also to insure that there is no diminution in the quality of education . . . . [Pet. App. 178a-179a.]

The state defendants sought in this Court a stay of the Court of Appeals' mandate insofar as it affected them. The state defendants' motion was denied by Mr. Justice Stewart on September 1, 1976.

Reasons For Denying the Writ

1. The issue sought to be brought on for review by this Court is neither worthy of invoking this Court's certiorari jurisdiction nor ready for this Court's consideration.

A. Essentially the state defendants are taking and have taken in the courts below the position that school desegregation in the city of Detroit is to them a matter of relative indifference except insofar as they might be required to assist in financing a feasible remedy. The obligation imposed on the state defendants by both the District Court and the Court of Appeals is not a matter of vicarious liability. The state defendants have been found, in findings never modified or reversed, to have themselves substantially contributed to racial isolation in the Detroit city schools. Indeed, a state legislative interposition, for a time successful, between the Detroit Board of Education and its effort toward voluntary fulfillment of its constitutional obligation sparked this litigation. It is not within the purview of the present petition to question the finding of the courts below that "Michigan State officers and agencies were guilty of acts which contributed substantially to the unlawful de jure segregation that exists in Detroit" (Pet. App. 179a); and there is neither warrant nor authority for overturning the District Court's finding, affirmed by the Court of Appeals, that the aspects of the plan here challenged "are necessary to repair the effects of past discrimination, assure a successful desegregation effort and minimize the possibility of resegregation," (Pet. App. 117a).

B. The petition does not suggest a conflict among the circuits on the matters offered for review. Courts in other circuits have, as occasion required, included adjuncts to or education components of pupil and faculty desegregation plans. *See, e.g., United States* v. *Jefferson County Board of Education,* 380 F.2d 385, 394 (5th Cir. 1967) (en banc) (remedial programs); *Morgan* v. *Kerrigan,* 401 F. Supp. 216, 246, 264 (D. Mass. 1975), *affirmed,* 530 F.2d 401, 428 (1st Cir. 1976), *cert. denied,* 44 U.S.L.W. 3717 (June 14,

1976) (state financial assistance); *United States* v. *State of Texas,* 342 F. Supp. 24 (E.D. Tex. 1971), *affirmed,* 466 F.2d 518 (5th Cir. 1972) (staff training, counseling, special education). Provisions for in-service teacher training were required by all of the desegregation plans prepared by the United States Department of Health, Education and Welfare which this Court ordered to be implemented *pendente lite* in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969). Contrary to the instant petition, overriding significance is not normally accorded such matters, which have perhaps been accorded greater importance in this case because of the effort to avert a resegregative reaction to desegregation. Moreover, as the state defendants' petition conceded (Petition at 12), as matters presently stand there are schools in the Detroit city school system which have been found to be segregated *de jure* and which will see only those aspects of the desegregation plan here at issue. That the critical focus in this and any other school-desegregation case is desegregation of pupils and faculties conduces against this Court's piecemeal review of relatively less significant aspects of a court-approved desegregation plan.

C. The State defendants' petition for writ of certiorari relies on a suggestion of projected financial expenditures which is not part of the record and has not been presented to the courts below for their consideration. The disposition of that side of the issue presented—whether the actual burden of carrying out the state defendants' remedial obligation is too great or disproportionate to the sustainable —has not been decided upon a record of actual costs. Nothing prevents the state defendants from making such a record in the lower courts and seeking modification in light thereof of the general duty imposed below.

2. The decisions of the courts below are not in conflict with *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

In *Edelman* this Court held that the Eleventh Amendment barred a federal court's granting a monetary award in the nature of damages or restitution for past benefits wrongfully withheld. To be sure, the injunction issued in this case is "not totally without effect on the State's revenues," 415 U.S. at 667, but the fiscal consequences to the state in this ase are "the necessary result of compliance with decrees which by their terms were prospective in nature," *id.* at 668. Any school-desegregation decree will necessarily entail some cost. Merely by seeking to share that cost among all parties found to have engaged in conduct causing *de jure* racial discrimination does not convert the remedy into an "award" nor does it render the decree retroactive. In any event, the effect, if any, of the Eleventh Amendment on school-desegregation decrees in general has been insufficiently considered by the Circuit Courts of Appeals to require this Court's consideration at this time.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

ELLIOT S. HALL
2755 Guardian Building
500 Griswold Avenue
Detroit, Michigan 48226

DAVID D. GREGORY
246 Deering Avenue
Portland, Maine 04102

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

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